No. 89-1625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF BURLINGTON and ROBERT WHALEN,
Operations Manager of Parks & Recreation Department,
Petitioners,

v.

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER,
and REVEREND ROBERT E. SENGHAS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED BY THE CITY OF BURLINGTON AND ROBERT WHALEN

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INTEREST OF THE *AMICUS CURIAE*

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

The members of NIMLO, including the Petitioner City of Burlington, Vermont are state political subdivisions. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own municipalities.

The attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of the citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

NIMLO finds this case to be of great significance. NIMLO's membership, which consists primarily of local governments, is faced daily with situations in which various individuals and groups request permission to place religious displays on public property. This Court's decision last year in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), provided certain guidance on placement of religious displays. However, questions remain, such as the one presented in this case: Whether a lone religious display, unaccompanied by secular symbols or symbols of other religions, is constitutionally permissible on public property traditionally used as a public forum.

In the instant case, the United States Court of Appeals for the Second Circuit found the placement of a menorah in Burlington, Vermont's municipally-owned City Hall Park to be in violation of the Establishment Clause of the First Amendment. NIMLO believes that ruling fails to correctly interpret the decision of this Court in *Allegheny*. In that case, this Court found the display of a creche on the grand staircase of the Allegheny County, Pennsylvania Courthouse to be unconstitu-

tional, but held constitutional the display located just outside the City-County Building of a menorah accompanied by a Christmas tree and a sign saluting liberty. The majority opinion of this Court indicated that the constitutionality of religious displays is largely determined by whether or not the overall setting of the display suggests government endorsement of religion.

Unlike the situation in *Allegheny*, the instant case involves placement of a religious display in a city-owned park which serves as a traditional public forum for the expression of speech protected under the First Amendment. As explained in the Argument, *infra*, p. 7, Justice Blackmun noted in the majority opinion that the creche in *Allegheny* did not present a public forum issue.

A grand stairway inside a courthouse is not a traditional public forum and clearly should not be given the same treatment for First Amendment purposes as a city park which has regularly been used by a variety of groups as a public forum. However, the Second Circuit Court of Appeals has found that the menorah display in Burlington's City Hall Park was violative of the Establishment Clause, notwithstanding the park's status as a traditional public forum.

Because of rulings such as that of the Second Circuit in the instant case, municipalities currently are faced with confusion over the status of the law regarding religious displays on municipal property which has been traditionally used as a public forum. Municipalities need explicit and clear guidelines from this Court on whether or not the constitutionality of religious displays in traditional public fora hinges on the overall setting of the display. The *Allegheny* decision clarified this point only for religious displays in situations involving non-traditional public fora.

Municipalities, including many NIMLO members, are frequently faced with uncertainty as to whether permits for reli-

gious displays should be granted. If such a permit is granted, the municipality may face liability for infringing upon the rights of those who believe the display constitutes an impermissible endorsement of religion. If the permit is denied, the municipality faces potential liability to religious organizations claiming a violation of their right to free speech. Clarification of the law by this Court would save the Nation's municipalities needless waste of taxpayers' dollars such litigation would entail.

Furthermore, NIMLO strongly urges this Court to grant Petitioners' request for certiorari so the Second Circuit's decision may be reversed. Similar rulings in the future can be prevented by holding that the *Allegheny* decision did not eviscerate *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd sub nom., Bd. of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985), in which this Court affirmed the Second Circuit's holding that placement of a privately sponsored religious symbol in a traditional public forum was not a violation of the Establishment Clause.

If decisions such as the ruling of the Second Circuit in the instant case are allowed to stand, municipalities will be forced to deny permits to religious groups wishing to place lone displays in traditional public fora such as city parks due solely to the fact that those seeking to place the displays are religious, rather than secular, in nature. Moreover, although municipalities would frequently be forced to deny religious display permits on First Amendment Establishment Clause grounds, they would often be required to approve permits of secular groups such as the Ku Klux Klan, the Nazi Party, or the Communist Party on First Amendment free speech grounds. The result is non-content neutral regulation based solely on the fact that the permit applicant has a religious purpose. Additionally, municipalities would then face the expense, burden, and political pressures of defending their action from challenge on free speech grounds.

NIMLO, therefore, urges this Court to grant the Petition for a Writ of Certiorari filed by Petitioners City of Burlington and Robert Whalen, and ultimately to reverse the ruling of the Second Circuit Court of Appeals.

Consent to the filing of this brief has been granted by Petitioners and by Respondents. Copies of the letters granting consent have been lodged with this Court.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioners' Petition for Writ of Certiorari is adopted by Amicus for purposes of this brief amicus curiae.

SUMMARY OF THE ARGUMENT

NIMLO urges this Court to grant the Petitioners' Petition for a Writ of Certiorari to allow the Court to establish a clear standard for placement of religious displays on public property that has traditionally served as a public forum. This Court's prior decisions touch on this issue, but do not address it in a way that provide governmental entities, such as municipalities, with clear guidance as to the constitutionality of such displays on public forum property.

NIMLO also urges this Court to reverse the decision of the United States Court of Appeals for the Second Circuit in the case below. The Second Circuit found the placement of the menorah display in Burlington's City Hall Park to be in violation of the Establishment Clause of the First Amendment to the United States Constitution. The Second Circuit's ruling misinterpreted not only existing case law, but also the purposes of the Establishment Clause.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ESTABLISH A CLEAR STANDARD FOR PLACEMENT OF RELIGIOUS DISPLAYS ON TRADITIONAL PUBLIC FORUM PROPERTY.

The public forum doctrine has been stated by this Court as follows:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.... For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

In the landmark Establishment Clause case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that governmental conduct which touches upon religion, if it is to be permissible under the Establishment Clause, (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster excessive entanglement with religion by a government. *Lemon* at 612-13. By agreeing to hear the instant case, this Court

could further clarify the principles intended in the Establishment Clause and set forth in *Lemon* by determining specific standards for religious displays placed on traditional public forum property.

The majority opinion of this Court in *Allegheny v. A.C.L.U.*, 109 S. Ct. 3086 (1989), along with the several concurring and dissenting opinions, addressed numerous issues involved in the placement of religious displays on public property. This Court in *Allegheny* followed the *Lemon* analysis, and used it in determining the constitutionality of each religious display. At no point in the *Allegheny* decision, however, is any specific conclusion reached as to the constitutionality of lone religious displays on public property which is considered to be a traditional public forum.

In Part IV of the majority's opinion in *Allegheny*, Justice Blackmun points out in Footnote 50 that "{t}he Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.... {T}he creche here does not raise the kind of 'public forum' issues...presented by the creche in *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd sub nom.* (by an equally divided Court), *Bd. of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985)." 109 S. Ct. at 3104.

In its per curiam decision in *McCreary*, this Court by a 4-4 vote affirmed a Second Circuit ruling which held that the granting of a permit by a municipality to private individuals to construct a creche in a public park during the Christmas season did not violate the Establishment Clause under the *Lemon* test. The lower court stated that a religious symbol such as a creche may be a form of speech for First Amendment purposes. *McCre-*

ary, 739 F.2d at 722.

The Second Circuit clearly upheld the creche display in *McCreary* because the display was in a park which served as a traditional public forum. Other groups, both non-religious and religious, had been permitted to use the park for First Amendment expression. The Second Circuit found that allowing the creche in the same public forum posed no threat to the Establishment Clause. *McCreary*, 739 F.2d at 725. Furthermore, the park was a traditional public forum, and other groups had been permitted to use the park for First Amendment expression. *McCreary*, 739 F.2d at 722.

Subsequently, this Court was confronted with the issue of religious displays on public forum property in *Chabad v. City of Pittsburgh*, 110 S.Ct. 708 (1989) (mem.) (upholding order vacating stay of preliminary injunction). In that case, this Court by a 6 to 3 margin in a memorandum opinion upheld an order by Justice Brennan to reinstate a preliminary injunction which had been issued by the United States District Court but stayed by the United States Court of Appeals for the Third Circuit. The preliminary injunction required the City of Pittsburgh to allow the display of a menorah on the steps of the City-County Building during Hanukkah.

In *Chabad*, unlike *Allegheny*, the religious group (not the municipality itself) wanted to place a menorah on the steps of the City-County Building. The District Court judge ruled that the lowest of the building's steps constituted a public forum and issued the preliminary injunction requiring the city to allow placement of the menorah. The resolution of *Chabad* conflicts with the ruling of the Second Circuit in the instant case. The menorah in both cases was a lone religious symbol, unaccompanied by any other religious or secular symbols. Both menorahs were placed on public property by a religious group against a backdrop of the municipality's main local government building.

However, while this Court agreed to an injunction mandating the placement of the menorah in the *Chabad* case, the Second Circuit in the instant case reached the opposite conclusion and found the Burlington menorah in violation of the First Amendment. This Court should further the public forum principles set forth in *McCreary* and state clear, comprehensive standards governing the placement of lone religious symbols on public fora. Such need unquestionably exists to prevent future inconsistencies and give municipalities straightforward guidelines in granting permits for religious displays on traditional public forum property.

II. CERTIORARI SHOULD BE GRANTED TO REVERSE THE SECOND CIRCUIT COURT OF APPEALS' DECISION FINDING THE PLACEMENT OF THE MENORAH IN BURLINGTON'S CITY HALL PARK UNCONSTITUTIONAL.

NIMLO urges this Court to reverse the decision of the Second Circuit. Ironically, in the instant case, it is the Second Circuit -- the same court that wrote the *McCreary* opinion -- which holds the menorah display in City Hall Park in violation of the Establishment Clause and finds its own *McCreary* holding not dispositive. The Second Circuit appears to distinguish the instant case primarily because of the proximity of the display to the City Hall building. See further discussion of this issue, *infra*, p. 11.

In finding the menorah display in City Hall Park unconstitutional, the Second Circuit has apparently taken the intention of the Establishment Clause to the extreme. The original purpose of the Establishment Clause was to prevent the new national government from setting up an established church financed and controlled by the government, such as the Church of England. *See Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). The Clause was designed to protect the religious liberties of those

individuals who did not belong to the majority church denomination, as well as non-believers. The Founding Fathers successfully fought this problem by building a wall of separation between church and state in the new nation through the drafting and subsequent ratification of the First Amendment and its Establishment and Free Exercise Clauses.

However, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court held that the Constitution does not require complete separation of church and state. Furthermore, the Court stated, the Establishment Clause mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. The Court explained that anything less than accommodation of all religions would require "callous indifference," which was not intended by the Establishment Clause. *Lynch* at 674.

The Second Circuit's ruling in this case is a prime example of a court taking separation of church and state to the point of hostility towards religion. The Second Circuit states, "Appellees {City of Burlington and Robert Whalen} argue that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place, and manner regulations. If this were so, however, the public forum doctrine would swallow up the Establishment Clause." *See City of Burlington, et al. v. Mark A. Kaplan, et al.*, 700 F.Supp. 1315 (D. Vt. 1988), *rev'd*, 891 F.2d 1024 (2nd Cir. 1989), *petition for cert. filed*, Apr. 17, 1990, No. 89-1625, at 891 F.2d 1029.

NIMLO posits that the Second Circuit has carried the purposes of the Establishment Clause to the extreme. Contrary to the public forum doctrine swallowing the Establishment Clause, the Second Circuit's ruling allows the Establishment Clause to swallow the right to free speech. This Court needs to clarify the jurisprudence on religious displays in a traditional public forum setting to prevent lower courts' misinterpretation of the relationship between the various clauses of the First Amend-

ment. The City of Burlington granted permits from 1982-1988 to allow use of City Hall Park for a wide variety of free speech activities, including political, commercial, artistic, and religious. *See City of Burlington* at Petition for a Writ of Certiorari, p. 3. Undoubtedly, the Founding Fathers did not intend for certain free speech rights to be abolished solely due to the fact that the speech involves a religious context.

One greatly troublesome portion of the Second Circuit's opinion, the section in which that court attempts to distinguish *McCreary* from the instant case, involves its interpretation of the connection between the physical placement of the menorah and its proximity to City Hall. The Second Circuit states, "here, unlike *McCreary*, the park involved is not any city park, but rather City Hall Park..." and goes on to explain that the location of the menorah display in this case led viewers to believe that the display was placed by the City of Burlington, which was therefore endorsing religion. *City of Burlington*, 891 F.2d at 1029. This reasoning is extremely distorted.

In *Allegheny*, Justice Blackmun stated in the majority opinion that since the creche in that case sat on the Grand Staircase, the "main" and "most beautiful part of the county government building, "{n}o viewer could reasonable think that it occupies this location without the support and approval of the government." *Allegheny*, 109 S.Ct. at 3104. The Second Circuit in the instant case cited this passage and applied the same language to the Burlington situation although the menorah was placed in a public park located approximately 60 feet away from the steps of Burlington City Hall. The Second Circuit claimed the undoubtable impression of government endorsement of religion resulted not only from the proximity of the display to City Hall, but also because "from the general direction of the westerly public street, the menorah appeared superimposed upon City Hall." *City of Burlington*, 891 F.2d at 1029 - 1030.

This interpretation of the facts by the Second Circuit failed to take into account the fact that the menorah in City Hall Park bore a disclaimer explaining that the display was sponsored by the Lubavitch of Vermont, not the City of Burlington. The Second Circuit explained that the disclaimer did not alter the message of religious endorsement because the menorah candles were lit in well-attended religious ceremonies, and because the creche in *Allegheny* also had a disclaimer sign. *City of Burlington*, 891 F.2d at 1029. However, the Allegheny County Courthouse creche, unlike the menorah in the instant case, was not located on property which is a traditional public forum.

The creche in *McCreary* was accompanied by a sign disclaiming municipal ownership of the display. The Second Circuit held in that case that a sufficiently prominent disclaimer sign indicating that the municipality did not sponsor the creche displayed in its park could prevent a finding that the creche violated the Establishment Clause. *McCreary*, 739 F.2d at 728.

This Court in *Allegheny* furthered the disclaimer idea, stating that while no sign can disclaim an overwhelming message of endorsement, an explanatory plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. *Allegheny*, 109 S.Ct. at 3115. The menorah in the instant case also had a disclaimer sign and the city even held press conferences disclaiming any endorsement of the display by the City of Burlington.

The Second Circuit's ruling in the instant case reflects unwarranted hostility toward religion which is adverse to the purposes of the Establishment Clause. Furthermore, that court has misinterpreted the *McCreary* and *Allegheny* decisions in its holdings on the proximity of the menorah display to the City Hall building. Therefore, this Court should reverse the decision of the Second Circuit, and agree to rule on the merits of this case.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that this Court grant Petitioners' Petition for a Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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